

## **MEMORANDUM**

**SUBJECT:** Implementation of Buy American provisions of P.L. 111-5, the “American Recovery and Reinvestment Act of 2009”

**FROM:** James A. Hanlon, Director  
Office of Wastewater Management (4201M)

Cynthia C. Dougherty, Director  
Office of Ground Water and Drinking Water (4601M)

**TO:** Water Management Division Directors  
Regions I - X

In order to implement the Buy American provisions of P.L. 111-5, the “American Recovery and Reinvestment Act of 2009” (ARRA), EPA has developed a logical approach to allow for easy implementation so that projects are not unduly delayed. The framework described below will allow assistance recipients to apply for waivers directly to State SRF programs. While EPA has the responsibility to make findings and determinations as to the issuance of waivers, this process respects the traditional role of State programs in working with assistance recipients.

### **Background**

Section 1605 of the ARRA requires that none of the appropriated funds may be used for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project is produced in the United States unless (a) a waiver is provided to the recipient by EPA or (b) compliance would be inconsistent with United States obligations under international agreements. A waiver may be provided if EPA determines that (1) applying these requirements would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent. This requirement has been included as a grant

condition in all EPA capitalization grants.

On April 3, 2009, the Office of Management and Budget (OMB) issued “Updated Implementing Guidance” for several aspects of ARRA, including (in Appendix 9, at pp. 135-169) the Buy American Requirement under Section 1605. The full text of this Guidance is at [http://www.whitehouse.gov/omb/assets/memoranda\\_fy2009/m09-15.pdf](http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-15.pdf). Definitions herein have incorporated the relevant text from the OMB Guidance, and provisions applicable to the SRFs are attached.

With regard to the inapplicability of this “Buy American” requirement to U.S. obligations under international agreements, current OMB interpretation in “Updated Implementation Guidance” issued April 3, 2009, on section 1605 appears to indicate that this provision only applies to direct procurement by certain State departments or the Federal government, and would not apply to assistance agreements between States and recipients providing SRF funding.

## **Definitions**

The following terms are critical to the interpretation and implementation of the Buy American provisions of the ARRA:

Steel: An alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements. Production in the United States of the iron or steel used in the project requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to iron or steel used as components or subcomponents of manufactured goods used in the project.

Manufactured Good: “Manufactured good” means a good brought to the construction site for incorporation into the building or work that has been--

(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

There is no requirement with regard to the origin of components or subcomponents in manufactured goods, as long as the manufacture of the goods occurs in the United States.

Reasonably Available Quantity: The quantity of iron, steel, or the relevant manufactured good is available or will be available at the time and place, and in the proper form or specification as specified in the project plans and design.

Satisfactory Quality: The quality of iron, steel, or the relevant manufactured good as specified in the project plans and designs.

## **Step-By-Step Waiver Process**

### Application by Assistance Recipient

The waiver process begins with the SRF assistance recipient. In order to fulfill the requirements of the ARRA, the assistance recipient must in good faith, while designing a project funded by the ARRA, solicit bids for construction with American made iron, steel, and manufactured goods. It is essential that the assistance recipient include the ARRA's Buy American terms in any request for proposals. The assistance recipient will have the opportunity to seek a waiver after the bid process is complete if one of two conditions is met:

1. Iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or
2. Inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

Proper and sufficient documentation must be provided by the assistance recipient. A checklist detailing the types of information required for a waiver to be processed is attached as Appendix 1. Initial consideration of the waiver request will be carried out by the State SRF program. The purpose of this initial consideration is to assess the sufficiency of the information provided by the assistance recipient.

### Evaluation by State Program

After receiving an application for waiver of the Buy American provisions from an SRF assistance recipient, the State must use the checklist in Appendix 1 to assess the sufficiency of the documentation submitted. The checklist provides a framework for examining the documentation. EPA will endeavor to assist the State in accessing appropriate contractor assistance to promote the use of effective expertise and national consistency in these assessments, for which the State may use appropriate set-aside (in the DWSRF) or Fund (in the CWSRF) resources for this purpose. While the State is not authorized to approve or disapprove a waiver request, the State can work with assistance recipients to ensure that all of the information in support of the request is accurate and sufficient for EPA review. All requests for waivers must be sent to EPA, whether or not the State program concludes that the application appears to be sufficient.

### Evaluation by EPA Regional Offices

After receiving an application for waiver of the Buy American provisions forwarded from a State SRF program, the Regional office must use the checklist in Appendix 2 to find whether the application properly and adequately documents the statutory basis cited for the waiver, and to determine whether or not to grant the waiver. The checklist provides guidance to Regional examiners for determining the adequacy of

documentation whether the assistance recipient is applying for a waiver for unavailability of a product or material, or due to substantial cost increases.

Recipients with waiver applications that the State does not forward to EPA may seek EPA Regional office review of the application. In such cases, in addition to its documented waiver request, the recipient must include any information provided by the State as to why it did not forward the request to the Regional office. It will be challenging to process these waivers in an effective and timely way, particularly because Federal Register publication specifically, and the heightened scrutiny associated with ARRA funds generally, increases the visibility of this work. Accordingly, to help inform and coordinate Regional decision-making on these requests, our Offices intend to develop a national, EPA-based contractor function to provide technical expertise in assessing individual waiver requests using Regional ARRA resources for management and oversight. By developing a national function to coordinate the processing of similar requests across the Regions, EPA will promote national consistency and address Regional concerns about the implementation of this new responsibility.

In the event that the Regional office finds that adequate documentation has been submitted, the Region Administrator may determine to grant a waiver to the assistance recipient. Granting such a waiver is a 2-step process:

1. Coordination – Prior to the issuance of a notification of waiver, the Regional Administrator must notify the Assistant Administrator for Water that a waiver has been approved, along with a copy of the proposed notification.
2. Publication by Regional office of notification of issuance of waiver in the Federal Register.

When notification of the issuance of a waiver is published in the Federal Register, the Regional office should follow up with the State program to ensure that the assistance recipient knows the waiver has been approved. The Regional office should also send appropriate information to Headquarters, for a link to the Federal Register notice to be posted on EPA's Recovery.gov website, in order to notify States and assistance recipients who may be similarly situated as to the circumstances underlying the detailed justification in the waiver notice.

#### Cross-Agency Coordination Working Group

EPA will establish a national coordination working group composed of representatives from our Offices in the two SRF programs, and from the Regions. This group will have two principal functions:

1. To provide oversight of the national contractor function through consultation, quality control, and direction as necessary to clarify and resolve policy issues raised on waiver requests being assessed by a contractor.
2. To identify the potential for appropriate national or (U.S. geographical) regional, categorical waivers to be issued based on similar circumstances

identified in the detailed justifications for a waiver or waivers. Such categorical waivers may be based on one or a combination of the grounds for a waiver specified in ARRA section 1605(b), as may be appropriate to the detailed justifications available or developed.

### Special Circumstances

Under certain special circumstances, EPA may grant a waiver of the Buy American provisions under the authority to waive such provisions if application of such provisions would be inconsistent with the public interest. A determination that application of the Buy American provisions would be inconsistent with the public interest must be made at EPA Headquarters due to the possible national implications of such a waiver. In such a circumstance the assistance recipient will request a waiver through the State SRF program, and again, the State program will work with the applicant to develop a complete application. This application will then be forwarded directly to EPA Headquarters, with a copy sent to the EPA Regional office.

EPA has issued a national “public interest” waiver, signed by Acting Assistant Administrator Michael Shapiro on April 1, 2009, for eligible projects for which a Clean or Drinking Water State Revolving Fund (SRF) has concluded or will conclude an assistance agreement using ARRA funds to refinance a debt incurred on or after October 1, 2008, and before February 17, 2009. The waiver was based on the SRF appropriations provision in ARRA Title VII authorizing refinancing of such debts: “The imposition of ARRA's Buy American requirements on [such] projects .... would in all cases entail time-consuming delay and thus displace the "shovel ready" status of these projects[, and] would frustrate Congress' specific and explicit intent to allow for the use of ARRA funds to refinance those projects through the SRFs, as well as for expeditious construction generally.”

Other circumstances that may warrant a determination that application of the Buy American provisions would be inconsistent with the public interest could include, for example, a project that may be able to achieve substantially greater water or energy efficiency than the average of currently available manufactured goods through the use of foreign-made products. Such efficiencies may offset the additional cost of such products if more expensive, or may be more cost-effective if the costs are similar. Requiring the less efficient product would frustrate Congress’ explicit and specific intent to achieve greater water and energy efficiency as stated in the SRF-specific 20% Green Project Reserve requirement in Title VII of the ARRA.

### National Waivers

EPA reserves the right to issue national waivers that may apply to particular classes of assistance recipients, particular classes of projects, or particular categories of iron, steel, or manufactured goods. As stated in the discussion of the “Cross-Agency Coordination Working Group,” above, EPA may develop national or (U.S. geographic) regional categorical waivers through the identification by that Working Group of similar

circumstances in the detailed justifications presented to one or more Regions in a waiver request or requests. In some cases, EPA will issue a national waiver based on policy decisions regarding the public's interest or a determination that a particular item is not produced nationally in reasonably available quantities or of a sufficient quality, or through patterns of unreasonable prices or unavailability of specific items identified by the Working Group or others. In such cases, EPA may determine it is necessary to issue a national waiver. All national waivers will be issued by EPA Headquarters.

### **Split Funding**

Based on their intended use plans many States intend to fund projects with “split” funding, from ARRA and the base SRF program. How does the Buy American requirement apply in such cases?

Breaking down the aspects of the requirement in section 1605(a), (1) no ARRA funds can be used for a project unless (2) all of the iron, steel, and manufactured goods (3) used in the project (4) are domestically produced. In the context of the split funding question, the key elements of this requirement are “all” of the goods, and “used in a project.”

There is no definition of a “project” in the statute. One approach is to interpret “project” as including whatever an assistance agreement described as covered by a particular source of funds. However, if EPA was thus to authorize States and assistance recipients simply to match the amount of ARRA assistance to the cost of the components of a project that were domestically produced or covered by a national waiver, that would negate the explicit objective of Section 1605(a) to apply to “all” of the covered items.

Conversely, a single assistance agreement may fund a variety of work that neutral observers would agree are functionally more than one project (such as pipe replacement in widely separated parts of a single utility).

Therefore, EPA has concluded that the scope of a “project” under 1605(a) should not be determined by whether funding is provided in one or in multiple assistance agreements, but rather by the nature of the work being undertaken. To split a project into parts for purposes of Buy American compliance, the parts of the project would have to be functionally different projects, performing distinguishable and non-overlapping functions in the utility or completed work. That is, if done in phases or simultaneously, each phase or part would have to be a distinct project whose basic functionality does not depend on the completion of subsequent or separate work that would not comply with section 1605.

Thus, the pipe replacement work described above could properly be considered separate projects if the split funding supported separate parts of a distribution or collection system that were functionally distinct from each other. Similarly, replacement and/or upgrades in functionally distinct parts of an existing wastewater or drinking water treatment plant could if funded separately be considered separate projects for purposes of section 1605, so long as the basic functioning of the plant at some level could continue if one “project” but not the other was built. This would not be the case in a new plant, as the individual

parts would be functionally useless unless the whole was built.

If you have any questions concerning the contents of this memorandum, you may contact us, or have your staff contact George Ames, Chief, State Revolving Fund Branch, Municipal Support Division, at (202) 564-0661, or Charles Job, Chief, Infrastructure Branch, Drinking Water Protection Division, at (202) 564-3941.

Attachment

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## ATTACHMENT

### TEXT APPLICABLE TO THE STATE REVOLVING FUNDS FROM OMB “UPDATED IMPLEMENTING GUIDANCE” OF APRIL 3, 2009, APPENDIX 9

#### **Subpart B—Buy American Requirement under Section 1605 of the American Recovery and Reinvestment Act of 2009.**

##### **§176.60 Statutory Requirement.**

Section 1605 of the Recovery Act prohibits use of recovery funds for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. The law requires that this prohibition be applied in a manner consistent with U.S. obligations under international agreements, and it provides for waiver under three circumstances:

- (a) Iron, steel, or relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;
- (b) Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent; or
- (c) Applying the domestic preference would be inconsistent with the public interest.

##### **§176.70 Policy.**

**Except as provided in 176.80 or 176.90--**

(a) None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work (see definitions at 176.140 and 176.160) unless—

- (1) The public building or public work is located in the United States; and
- (2) All of the iron, steel, and manufactured goods used in the project are produced or manufactured in the United States.
  - (i) Production in the United States of the iron or steel used in the project requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to iron or steel used as components or subcomponents of manufactured goods used in the project.
  - (ii) There is no requirement with regard to the origin of components or



subcomponents in manufactured goods used in the project, as long as the manufacturing occurs in the United States.

(b) Paragraph (a) shall not apply where the Recovery Act requires the application of alternative Buy American requirements for iron, steel, and manufactured goods.

**§176.80 Exceptions.**

(a) When one of the following exceptions applies in a case or category of cases, the award official may allow the recipient to use foreign iron, steel and/or manufactured goods in the project without regard to the restrictions of section 1605 of the Recovery Act:

(1) Nonavailability. The head of the Federal department or agency may determine that the iron, steel or relevant manufactured good is not produced or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at 48 CFR 25.104(a) and the procedures at 48 CFR 25.103(b)(1) also apply if any of those articles are manufactured goods needed in the project.

(2) Unreasonable cost. The head of the Federal department or agency may determine that the cost of domestic iron, steel, or relevant manufactured goods will increase the cost of the overall project by more than 25 percent in accordance with 176.110.

(3) Inconsistent with public interest. The head of the Federal department or agency may determine that application of the restrictions of section 1605 of the Recovery Act would be inconsistent with the public interest.

(b) Determination. When a determination is made for any of the reasons stated in this section that certain foreign iron, steel, and/or manufactured goods may be used—

(1) The award official shall list the excepted materials in the award; and

(2) The head of the Federal department or agency shall publish a notice in the Federal Register within two weeks after the determination is made, unless the item has already been determined to be domestically nonavailable. A list of items that are not domestically available is at 48 CFR 25.104(a). The Federal Register notice or information from the notice may be posted by OMB to Recovery.gov. The notice shall include—

(i) The title “Buy American Exception under the American Recovery and Reinvestment Act of 2009”;

(ii) The dollar value and brief description of the project; and

- (iii) A detailed written justification as to why the restriction is being waived.

**§176.90 Non-application to acquisitions covered under international agreements.**

(a) Acquisitions covered by international agreements. Section 1605(d) of the Recovery Act provides that the Buy American requirement in section 1605 shall be applied in a manner consistent with U.S. obligations under international agreements.

(1) The Buy American requirement set out in 176.70 shall not be applied where the iron, steel or manufactured goods used in the project are from a Party to an international agreement, listed in paragraph (2), and the recipient is required under an international agreement, described in the Appendix to this Subpart, to treat the goods and services of that Party the same as domestic goods and services. This obligation shall only apply to projects with an estimated value of \$7,443,000 or more and projects that are not specifically excluded from the application of those agreements.

(2) The international agreements that obligate recipients that are covered under an international agreement to treat the goods and services of a Party the same as domestic goods and services and the respective Parties to the agreements are:

(i) The World Trade Organization Government Procurement Agreement (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and United Kingdom);

(ii) The following Free Trade Agreements:

(A) Dominican Republic-Central America-United States Free Trade Agreement (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua);

(B) North American Free Trade Agreement (NAFTA) (Canada and Mexico);

(C) United States-Australia Free Trade Agreement;

(D) United States-Bahrain Free Trade Agreement;

(E) United States-Chile Free Trade Agreement;

- (F) United States-Israel Free Trade Agreement;
- (G) United States-Morocco Free Trade Agreement;
- (H) United States-Oman Free Trade Agreement;
- (I) United States-Peru Trade Promotion Agreement; and
- (J) United States-Singapore Free Trade Agreement; and

(iii) United States-European Communities Exchange of Letters (May 15, 1995): Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and United Kingdom.

**§176.100 Timely determination concerning the inapplicability of section 1605 of the Recovery Act.**

- (a) The head of the Federal department or agency involved may make a determination regarding inapplicability of section 1605 to a particular case or to a category of cases.
- (b) Before Recovery Act funds are awarded by the Federal agency or obligated by the recipient for a project for the construction, alteration, maintenance, or repair of a public building or public work, an applicant or recipient may request from the award official a determination concerning the inapplicability of section 1605 of the Recovery Act for specifically identified items.
- (c) The time for submitting the request and the information and supporting data that must be included in the request are to be specified in the agency's and recipient's request for applications and/or proposals, and as appropriate, in other written communications. The content of those communications should be consistent with the notice in 176.150 or 176.170, whichever applies.
- (d) The award official must evaluate all requests based on the information provided and may supplement this information with other readily available information.
- (e) In making a determination based on the increased cost to the project of using domestic iron, steel, and/or manufactured goods, the award official must compare the total estimated cost of the project using foreign iron, steel and/or relevant manufactured goods to the estimated cost if all domestic iron, steel, and/or relevant manufactured goods were used. If use of domestic iron, steel, and/or relevant manufactured goods would increase the cost of the overall project by more than 25 percent, then the award official shall determine that the cost of the domestic iron, steel, and/or relevant manufactured goods is

unreasonable.

**§176.110 Evaluating proposals of foreign iron, steel, and/or manufactured goods.**

(a) If the award official receives a request for an exception based on the cost of certain domestic iron, steel, and/or manufactured goods being unreasonable, in accordance with section 176.80, then the award official shall apply evaluation factors to the proposal to use such foreign iron, steel, and/or manufactured goods as follows:

(1) Use an evaluation factor of 25 percent, applied to the total estimated cost of the project, if the foreign iron, steel, and/or manufactured goods are to be used in the project based on an exception for unreasonable cost requested by the applicant.

(2) Total evaluated cost = project cost estimate + (.25 x project cost estimate, if (a)(1) applies).

(b) Applicants or recipients also may submit alternate proposals based on use of equivalent domestic iron, steel, and/or manufactured goods to avoid possible denial of Recovery Act funding for the proposal if the Federal government determines that an exception permitting use of the foreign item(s) does not apply.

(c) If the award official makes an award to an applicant that proposed foreign iron, steel, and/or manufactured goods not listed in the applicable notice in the request for applications or proposals, then the award official must add the excepted materials to the list in the award term.

**§176.120 Determinations on late requests.**

(a) If a recipient requests a determination regarding the inapplicability of section 1605 of the Recovery Act after obligating Recovery Act funds for a project for construction, alteration, maintenance, or repair (late request), the recipient must explain why it could not request the determination before making the obligation or why the need for such determination otherwise was not reasonably foreseeable. If the award official concludes that the recipient should have made the request before making the obligation, the award official may deny the request.

(b) The award official must base evaluation of any late request for a determination regarding the inapplicability of section 1605 of the Recovery Act on information required by paragraphs (c) and (d) of the applicable notice at 176.150 or 176.170 and/or other readily available information.

(c) If a determination, under 176.80 is made after Recovery Act funds were obligated for a project for construction, alteration, maintenance, or repair that an exception to section 1605 of the Recovery Act applies, the award official must amend the award to allow use of the foreign iron, steel, and/or relevant manufactured goods. When the basis of the

exception is nonavailability or public interest, the amended award shall reflect adjustment of the award amount, redistribution of budgeted funds, and/or other appropriate actions taken to cover costs associated with acquiring or using the foreign iron, steel, and/or manufactured goods. When the basis for the exception is the unreasonable cost of domestic iron, steel, and/or manufactured goods the award official shall adjust the award amount or the budget, as appropriate, by at least the differential established in 176.110(a).

#### **§176.130 Noncompliance.**

The award official must—

- (a) Review allegations of violations of section 1605 of the Recovery Act;
- (b) Unless fraud is suspected, notify the recipient of the apparent unauthorized use of foreign iron, steel, and/or manufactured goods and request a reply, to include proposed corrective action; and
- (c) If the review reveals that a recipient or sub-recipient has used foreign iron, steel, and/or manufactured goods without authorization, take appropriate action, including one or more of the following:
  - (1) Process a determination concerning the inapplicability of section 1605 of the Recovery Act in accordance with 176.120.
  - (2) Consider requiring the removal and replacement of the unauthorized foreign iron, steel, and/or manufactured goods.
  - (3) If removal and replacement of foreign iron, steel, and/or manufactured goods used in a public building or a public work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Federal Government, the award official may determine in writing that the foreign iron, steel, and/or manufactured goods need not be removed and replaced. A determination to retain foreign iron, steel, and/or manufactured goods does not constitute a determination that an exception to section 1605 of the Recovery Act applies, and this should be stated in the determination. Further, a determination to retain foreign iron, steel, and/or manufactured goods does not affect the Federal Government's right to reduce the amount of the award by the cost of the steel, iron, or manufactured goods that are used in the project or to take enforcement or termination action in accordance with the agency's grants management regulations.
  - (4) If the noncompliance is sufficiently serious, consider exercising appropriate remedies, such as withholding cash payments pending correction of the deficiency, suspending or terminating the award, and withholding further awards for the project. Also consider preparing and forwarding a report to the agency suspending or debarring official in accordance with the agency's debarment rule

implementing 2 CFR part 180. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

**§176.140 Award term- Required Use of American Iron, Steel, and Manufactured Goods—Section 1605 of the American Recovery and Reinvestment Act of 2009.**

When awarding Recovery Act funds for construction, alteration, maintenance, or repair of a public building or public work that does not involve iron, steel, and/or manufactured goods covered under international agreements, the agency shall use the following award term:

**REQUIRED USE OF AMERICAN IRON, STEEL, AND MANUFACTURED GOODS—SECTION 1605 OF THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009**

(a) **Definitions.** As used in this award term and condition—

“Manufactured good” means a good brought to the construction site for incorporation into the building or work that has been--

- (1) Processed into a specific form and shape; or
- (2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

“Public building” and “public work” means a public building of, and a public work of, a governmental entity (the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and local governments; and multi-State, regional, or interstate entities which have governmental functions). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.

“Steel” means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

(b) *Domestic preference.*

- (1) This award term and condition implements Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act)(Pub. L. 111-5), by requiring that all iron, steel, and manufactured goods used in the project are produced in the United States except as provided in paragraph (b)(3) and (b)(4) of this term and condition.

(2) This requirement does not apply to the material listed by the Federal Government as follows:

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**[Award official to list applicable excepted materials or indicate “none”]**

(3) The award official may add other iron, steel, and/or manufactured goods to the list in paragraph (b)(2) of this term and condition if the Federal government determines that—

(i) The cost of the domestic iron, steel, and/or manufactured goods would be unreasonable. The cost of domestic iron, steel, or manufactured goods used in the project is unreasonable when the cumulative cost of such material will increase the cost of the overall project by more than 25 percent;

(ii) The iron, steel, and/or manufactured good is not produced, or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act would be inconsistent with the public interest.

*(c) Request for determination of inapplicability of Section 1605 of the Recovery Act.*

(1) (i) Any recipient request to use foreign iron, steel, and/or manufactured goods in accordance with paragraph (b)(3) of this term and condition shall include adequate information for Federal Government evaluation of the request, including—

(A) A description of the foreign and domestic iron, steel, and/or manufactured goods;

(B) Unit of measure;

(C) Quantity;

(D) Cost;

(E) Time of delivery or availability;

(F) Location of the project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign iron, steel, and/or manufactured goods cited in accordance with paragraph (b)(3) of this term and condition.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this term and condition.

(iii) The cost of iron, steel, and/or manufactured goods material shall include all delivery costs to the construction site and any applicable duty.

(iv) Any recipient request for a determination submitted after Recovery Act funds have been obligated for a project for construction, alteration, maintenance, or repair shall explain why the recipient could not reasonably foresee the need for such determination and could not have requested the determination before the funds were obligated. If the recipient does not submit a satisfactory explanation, the award official need not make a determination.

(2) If the Federal government determines after funds have been obligated for a project for construction, alteration, maintenance, or repair that an exception to section 1605 of the Recovery Act applies, the award official will amend the award to allow use of the foreign iron, steel, and/or relevant manufactured goods. When the basis for the exception is nonavailability or public interest, the amended award shall reflect adjustment of the award amount, redistribution of budgeted funds, and/or other actions taken to cover costs associated with acquiring or using the foreign iron, steel, and/or relevant manufactured goods. When the basis for the exception is the unreasonable cost of the domestic iron, steel, or manufactured goods, the award official shall adjust the award amount or redistribute budgeted funds by at least the differential established in 2 CFR 176.110(a).

(3) Unless the Federal Government determines that an exception to section 1605 of the Recovery Act applies, use of foreign iron, steel, and/or manufactured goods is noncompliant with section 1605 of the American Recovery and Reinvestment Act.

(d) **Data.** To permit evaluation of requests under paragraph (b) of this term and condition based on unreasonable cost, the Recipient shall include the following information and any applicable supporting data based on the survey of suppliers:

FOREIGN AND DOMESTIC ITEMS COST COMPARISON			
Description	Unit of Measure	Quantity	Cost (Dollars)*
<b>Item 1:</b>			
Foreign steel, iron, or manufactured good	_____	_____	_____
Domestic steel, iron, or manufactured good	_____	_____	_____
<b>Item 2:</b>			
	_____	_____	_____



Foreign steel, iron, or manufactured good	_____	_____	_____
Domestic steel, iron, or manufactured good			
<p><b>[List name, address, telephone number, email address, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.]</b></p> <p><b>[Include other applicable supporting information.]</b></p> <p><b>[* Include all delivery costs to the construction site.]</b></p>			

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